Supreme Court, U.S.
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IN THE
# SUPREME COURT OF THE UNITED STATES

STEVEN L. SCHLUNEGER,
*Petitioner*,

v.

UNITED STATES OF AMERICA,
*Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. May a surety, who completes the work as demanded by the government, be convicted of conspiracy to defraud when the claims made and paid are within and according to the terms of the contract guaranteed, or, may the surety be required to complete the work for less than the contract price?

II. Has the Sixth Amendment right of Petitioner been denied when the trial judge made statements in the presence of the jury which conveyed that the government had been defrauded and that there was no defense?

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## OPINIONS BELOW

The United States Court of Appeals for the Tenth Circuit opinion in this case is reported at 184 $F^3$ 1154 ($10^{th}$ Cir. 1999). The opinion issued by the Court is copied in the Appendix, App. A at 1a-12a. The Order of the District Court for the Northern District of Oklahoma (unpublished) is included in the Appendix, App. B. at 13a-20a. The District Court Judgment and Sentence is printed in the Appendix, App. C. at 21a-30a.

## JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered its opinion on July 9, 1999. On August 19, 1999, the Tenth Circuit Court of Appeals entered its Order denying petitioner's Petition For Rehearing (App. D at 31-32a). This Petition For Writ of Certiorari is filed within ninety (90) days of the denial of the Petition For Rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment

"No person shall ... be deprived of life, liberty, or property without due process of law;" ...

* * * * *

U.S. Const., Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury"...

* * * * *

18 U.S.C. §371

> "If two or more persons conspire . . . to defraud the United States or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both."

## STATEMENT OF THE CASE

Petitioner, Steven L. Schluneger, comes before this Court having been convicted by a jury of one count of conspiracy to defraud the United States, more specifically, the U.S. Army Corps of Engineers. (18 U.S.C. §371) Schluneger was sentenced to be imprisoned for twelve (12) months, to supervised release of thirty-six (36) months and restitution required of $10,000.00. (App. C at 21a-30a)

The circumstances leading to this conviction are as follows: the Corps of Engineers solicited bids on a fixed price contract for sandblasting and painting water control gates on two dams across the Arkansas River in Oklahoma. The bid was awarded to one Frank Minelli for approximately 1.8 million dollars. Thomas Rhoades and Steven Schluneger, your petitioner, became the required individual sureties for Minelli and furnished the required performance and payment bonds. Minelli mobilized and after barely commencing the work for the Corps, was terminated. At the time of termination, approximately 1.6 million dollars remained unexpended on the contract.

The U.S. Corps of Engineers made demand on the sureties, Rhoades and Schluneger, pursuant to their bonds. Rhoades and Schluneger elected to perform the contract and found a subcontractor, Skyline Painting, who agreed to accomplish the work of the Minelli contract, for a sum less than the remaining balance of 1.6 million dollars, which the Corps was obligated to pay. The Corps did not request or inquire into the terms of the subcontract with Skyline Painting.

"To perform under the bond, the Corps of Engineers required Rhoades and Schluneger to execute a Takeover Agreement. The Takeover Agreement restricted Rhoades and Schluneger from receiving any compensation for the work performed except for 'actual costs and expenses incurred in completion of the work'." (District Court Order, App. B at 15a)

For approximately three (3) years the work proceeded on the Arkansas River with monthly progress payments being claimed and paid according to the schedules in the Minelli - Corps contract. The Minelli contract with the Corps was amended several times to meet the needs of the parties. After the execution of the Takeover Agreement, its terms were never raised by the Corps, until the issuance of the indictments in this case.

The indictments accused the defendants, Rhoades, Schluneger and Robert Hughes and his companies of conspiring to defraud the Corps by submitting claims for payment in excess of the costs and expenses of Rhoades and Schluneger. The same Tenth Circuit panel, in the Hughes appeal, describes the fraud as follows: "Essentially, their plan was to recover the difference remaining on the Minelli contract over and above the price of the Skyline bid." There

has been no claim by the government that the progress payments paid to Rhoades and Schluneger exceeded the amount which the Corps had agreed to pay Minelli in the original contract. There is no dispute with the facts that the Corps of Engineers demanded that Rhoades and Schluneger execute the Takeover Agreement, prepared by the Corps, prior to performance.

The District Court had jurisdiction pursuant to 18 U.S.C. §3231 of offenses against the laws of the United States, in this case, 18 U.S.C. §371. Petitioner raised in the trial court the defense that there was no crime or fraud as he was subrogated to the rights of Minelli and that there was no consideration for reducing the value of performance to "costs and expenses". The case was tried to a jury who convicted all defendants. Between the time of conviction and sentencing, the defendant Thomas Rhoades died.

Petitioner appealed his conviction to the Court of Appeals for the Tenth Circuit. Petitioner cited case authority to the trial court and the appeals court on the question of subrogation and his Fifth Amendment right to the full value of the Minelli Corps contract has resulted in the response of "This argument is without merit." (App. A at 7a) There is no citation of authority which supports the conviction or "without merit" conclusion.

Likewise, petitioner has raised before the trial and appeal courts the proposition that his Sixth Amendment right to have a jury determine his guilt was violated, by the statement made in the presence of the jury, by the trial judge:

> "I'm sorry, but that is not a defense. You don't have the right to defraud the government, no matter what, if that occurred.

... Now, are you trying to say that they just owe the flat money back to the government?" (full text, App. E at 35a-36a)

Although petitioner has cited authority that this statement basically directed a verdict of guilty, there is complete silence. It is as though the Sixth Amendment does not exist or can be ignored. It is as though not addressing the issue will cause it to disappear. The trial court's order denying post trial motions does not mention or discuss this statement's impact on the jury. Likewise it is ignored by the appellate opinion which petitioner petitions this Court to review.

## ARGUMENT FOR GRANTING THIS WRIT

The Courts below chose to dismiss the contractual basis of this litigation as being without merit and chose to completely ignore the statement of the trial judge, in the presence of the jury, which directed a guilty verdict.

The published opinion of the Court of Appeals conflicts, on the question of the performing sureties' rights, with the following precedents:

*United States v. Munsey Trust Co.*, 332 U.S. 234 (1947);

*Pearlman v. Reliance Insurance Co.*, 371 U.S. 132 (1962);

*Prairie State Nat. Bank of Chicago v. United States*, 164 U.S. 227 (1896); and

*Henningsen v. U.S.F. & G.*, 208 U.S. 404 (1908)

The above precedents are cited in the analysis of the Fifth Circuit case of *Trinity Universal Insurance Company v.*

*United States,* 382 $F^2$ 317 (5th Cir. 1967), a case which correctly analyses subrogation rights and should be applied in this case.

The opinion below also ignores the fact that contract rights against the United States are protected by the due process clause of the Fifth Amendment. *Lynch v. U.S.* 292 U.S. 571 (1934); *Madera Irrigation Dist. v. Hancock*, 985 $F^2$1397 (9th Cir. 1993)

As to the statement made by the trial judge in the presence of the jury, the published opinion makes no reference. The Tenth Circuit panel ignored the Sixth Amendment right of the petitioner to have his case decided by a jury and ignored the following precedent: *Taylor v. Louisiana,* 419 U.S. 522 (1975); *Apodaca v. Oregon,* 406 U.S. 404 (1972); *Quercia v. United States*, 289 U.S. at 470

The issues addressed here are compelling. Petitioner has been denied any reasoning which supports his imprisonment in the face of compelling and controlling authorities to the contrary. This Court's supervisory power should be exercised in this case.

## ARGUMENT 1

### No crime has been committed, therefore no conspiracy exists.

Operation of law defines the rights and obligations of Rhoades and Schluneger. Subrogation is the very basis of the relationship which arose when Minelli defaulted, the Corps demanded performance from Rhoades and Schluneger as sureties and pursuant to that demand, Rhoades and Schluneger agreed to complete the Minelli-Corps contract.

The case of *Trinity Universal Insurance Company v. United States*, 382 F$^2$ 317 (5$^{th}$ Cir. 1967) is very much in point. In this case the surety completed the work, under its performance bond obligation, and was paid the last progress payments and the retainage due the original contractor, except the Government withheld $6,495.07 as a set-off for unpaid withholding and employment taxes owed by the contractor on the project. The surety sued for this sum and recovered. The Fifth Circuit relies on the precedents of *United States v. Munsey Trust Co.*, 332 U.S. 234, 67 S. Ct. 1599, 91 L.Ed. 2022 (1947); *Pearlman v. Reliance Insurance Co.*, 371 U.S. 132, 83 S. Ct. 239, 9 L.Ed$^2$ 190 (1962); *Prairie State Nat. Bank of Chicago v. United States*, 164 U.S. 227, 17 S. Ct. 142, 41 L. Ed. 412 (1896); and *Henningsen v. U.S. F. & G.*, 208 U.S. 404, 28 S. Ct. 389, 52 L.Ed. 547 (1908).

*Trinity*, 382 F$^2$ at 320:

> "A different situation occurs when the surety completes the performance of a contract. The surety is not only a subrogee of the contractor, and therefore a creditor, but also a subrogee of the government and entitled to any rights the government has to the retained funds. If the contractor fails to complete the job, the government can apply the retained funds and any remaining progress money to costs of completing the job. On the other hand, the surety may undertake to complete the job itself. In so doing, it performs a benefit for the government, and has a right to the retained funds and remaining progress money to defray its costs. The surety who undertakes to complete the project is entitled to the funds in the hands of the government, not as a creditor and subject to setoff, but as a subrogee having

the same rights to the funds as the government."

At 321:
"The same result is reached more directly by the alternative concept that the surety's contract with the government contemplates that the full contract price will be applied to the completion of the contract. Subsequent to the default by Dallas Building, Inc., the surety agreed with the government to take over and complete the principal contract. Implicit in this agreement is the right of the surety to all retained funds and any remaining progress sums. In the words of *Munsey*: 'The surety has promised that * * * in the case of performance bond, that work will be done at a certain price.'

We are not convinced that the government, after entering an agreement such as the one in this case, should have a right to retained funds superior to the rights of the surety. If the government undertook to complete the contract, the surety would be liable for costs exceeding the contract price, but not for taxes owed by the contractor. The surety should not be worse off because it undertakes to finish the job. **The performance bond is to assure that the government has a completed project for the agreed contract price.** The obligation may be performed either in kind or in money. Performance results equally when the surety completes the contract or when the surety pays the government any damage which the

government incurs in completing the job. **In either event, the surety is entitled to have the full contract price applied to the performance of the contract.**" (emphasis supplied)

Under this reasoning, the subrogation rights of Rhoades and Schluneger require that the Takeover Agreement and its cost and expense language be interpreted in accord with the full reading of Federal Acquisition Regulation 49.404 and that subparagraph (d) be given application. The limitation on the sureties to cost and expense is then related to the earned but unpaid funds of the original contractor. In fact, *Trinity* could be a blue print for the regulation. In this case Rhoades and Schluneger made no claim to funds earned, but unpaid, to Minelli. Rhoades and Schluneger had the right to claim the contract price under subrogation.

The Government, in this case, predicated its charge that the defendants were guilty of taking money by false pretenses or false claims on the simple proposition that the claims made and paid exceeded the sum due the subcontractor, Skyline. Thus, the claims exceeded the cost and expense language of the Takeover Agreement. This proposition is not supported by law, as there has been no damage to the Government. All of the claims and payments were made in accord with the specifications and values of the Minelli-Corps contract to which Rhoades and Schluneger succeeded as subrogees.

No crime has been committed, therefore no conspiracy exists.

## ARGUMENT 2

**The Fifth Amendment precludes arbitrary alteration of contract rights to confine the sureties to costs and expense.**

That being the case, *i.e.*, full subrogation, the Corps had no right to seek to change or lower the consideration due the sureties through the Takeover Agreement. The Fifth Amendment to our Constitution, by means of its due process clause, protects the rights of subrogation of the surety, should he perform. Contract rights against the United States are protected by the due process clause of the Fifth Amendment. *Lynch v. U.S.*, 54 S.Ct. 840, 292 U.S. 571 (1934). The amendment limits the exercise of sovereign power which would impair obligations under government contracts. *Madera Irrigation Dist. v. Hancock*, 985 $F^2$ 1397 ($9^{th}$ Cir. 1993).

The Takeover Agreement should not be applied to limit the performing surety to his "costs and expenses". To do so violates the sureties' right to full subrogation and more importantly, violates the due process clause of the Fifth Amendment.

As a matter of law, there was no fraud, therefore this argument does have merit. It also has the benefit of case law precedent, no precedent to the contrary, and the U. S. Constitution's Bill of Rights to support the contention. For the government and this lower court to dismiss the very basis of this litigation, to say that the contractual relationship there established and the laws governing that relationship are "without merit", is wrong, unless there is law to support that position. None has been cited. The Fifth Amendment precludes the alteration of this contractual relationship, to

encompass "costs and expense" as defined in the Takeover Agreement.

## ARGUMENT 3

**Petitioner was denied his Sixth Amendment right to have a jury determine his guilt.**

The question is, did the following colloquy, in the full hearing of the jury, violate the Sixth Amendment rights of Schluneger?

> (Appendix E at 34a-35a:)
> "THE COURT: Mr. Hughes, just one moment. The gentlemen requested a takeover agreement. The government agreed to the takeover agreement. They signed the Takeover agreement. Nobody has contested the validity of the Takeover Agreement because it is uncontestable.
>
> Now, let's go on to the matters that are at hand. There is no question but they undertook the completion of the project, based upon the Takeover Agreement. Now, if you've got any relevant questions of this witness, that's fine. If you haven't, then let's not get into prior negotiations that no longer have relevance here.
>
> MR. HUGHES: Your Honor, I submit - I appreciate that, Your Honor, and I submit that the prior negotiations may be relevant if the defendants did not understand the contract they were signing.

> THE COURT: I'm sorry, but that is not a defense. You don't have the right to defraud the government, no matter what, if that occurred. You have the right to submit, there's no question, but that there was a submittal of these monies and the government paid out under the agreement. Now, are you trying to say that they just owe the flat money back to the government?"

This statement by the trial judge tells the jury. . . "that is not a defense. You don't have the right to defraud the government". . . The comment about owing the money back is a skillful comment which implanted in the jury's mind that fraud, in fact, had been committed. This deprived Schluneger of his Sixth Amendment right to have a jury decide his guilt or innocence.

The purpose of the Sixth Amendment right to trial by jury is to guard against the exercise of arbitrary power, to make available the common-sense judgment of the community as a hedge against the overzealous or mistaken prosecutor. This is also in preference to the professional or perhaps over-conditioned or biased response of a judge. *Taylor v. Louisiana,* 419 U.S. 522 (1975); *Apodaca v. Oregon*, 406 U.S. 404 (1972); *Quercia v. United States* (1933).

## CONCLUSION

The Court of Appeals decision in this case is not supported by law. The law has simply been ignored. Steven L. Schluneger was fully subrogated to the rights of Minelli forced upon him when Minelli defaulted. There is no logic or law which would require a performing surety to complete the contract for less than the original contract amount. The

claims were made and paid according to the original contract, not according to the Takeover Agreement which the government contends limits claims to a lesser amount. There was no fraud as the government suffered no loss.

It is undisputed, because of silence, that Schluneger was denied his Sixth Amendment right to have the jury determine his guilt or innocence.

This Petition for Writ of Certiorari should be granted.

Respectfully submitted,

/s/_____

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## APPENDIX A

## UNITED STATES COURT OF APPEALS
## TENTH CIRCUIT

[Filed July 9, 1999]

No. 98-5200

UNITED STATES OF AMERICA,
*Plaintiff- Appellee,*

v.

STEVEN L. SCHLUNEGER,
*Defendant - Appellant.*

**Appeal from the United States District Court
for the Northern District of Oklahoma
(D.C. No. 97-CR-98-C)**

Before **TACHA, MAGILL,*** and **BRISCOE**, Circuit Judges.

**MAGILL**, Circuit Judge.

* Honorable Frank Magill, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

A jury convicted Stephen Schluneger on one count of conspiracy to defraud the government. The district court denied Schluneger's motions for a judgment of acquittal and for a new trial, and sentenced Schluneger to twelve months' imprisonment. Schluneger appeals both his conviction and his sentence. We affirm.

## I.

In February 1988 the United States Army Corps of Engineers (Corps) awarded a $1.8 million contract to Frank Minelli, doing business as Swiss Craft Professional Painters, for sandblasting and painting various locks and dams along the Arkansas River (Minelli contract). As a condition of the contract, Minelli was required to provide the Corps with payment and performance bonds. Thomas Rhoades and Schluneger furnished the bonds as sureties in case Minelli defaulted on the government contract.

Minelli eventually defaulted on the contract, and on July 18, 1989, the Corps terminated him as the contractor. The Corps then demanded that Rhoades and Schluneger satisfy their obligations and liability under the terms of the bonds. The unpaid balance at the time of termination was approximately $1.69 million. Under the bonds' terms and relevant federal acquisition regulations, Rhoades and Schluneger had three options: complete the work with a contractor of their choice that was acceptable to the government, complete the work with their own resources, or discharge their liability under the bond by payment to the government. Rhoades and Schluneger opted to complete the work with a contractor of their choice.

Rhoades and Schluneger subsequently accepted a bid from Skyline Painting, Inc. (Skyline) to complete the work on the Minelli contract for $1.2 million. On August 4, 1989, Rhoades and Schluneger informed the Corps of their intent to have Skyline finish the contract and asked to sign a takeover agreement. The Takeover Agreement, as executed by Rhoades and Schluneger with the Corps, restricted Rhoades and Schluneger from receiving any compensation for the work performed except for "actual costs and expenses incurred in the completion of the work." Takeover Agreement at ¶ 8. The Takeover Agreement provided that Rhoades and Schluneger were not to be compensated for "any amount in excess of [their] total expenditures necessarily made in completing the work and discharging" their liability under the performance bond. Id. at ¶ 10. The Takeover Agreement was eventually signed on August 14, 1989.

Between the time they notified the Corps of their intent to have Skyline finish the Minelli contract and the time they signed the Takeover Agreement, Rhoades and Schluneger entered into a series of agreements, not disclosed to the Corps, which had the intent and effect of billing the government for more than their actual costs and expenses. Although Skyline's bid to complete the Minelli contract was $1.2 million, Rhoades and Schluneger requested that Skyline sign an agreement (Skyline Subcontract), prepared by attorney T. Robert Hughes, stating that Skyline would complete the work for the "agreed contract price of $1,690,000," the entire amount remaining on the Minelli contract. Skyline Subcontract at 1. This agreement was signed on August 10, 1989.

Skyline understood, however, that it was to receive only $1.2 million, and that the difference was to be paid to Rhoades and Schluneger as finder's fees and engineering consulting fees. Although Skyline believed these fees to be legitimate, in fact they were bogus, and, as the evidence at trial showed, neither Schluneger nor his associates ever performed any consulting work. This fee arrangement was memorialized in another agreement, prepared by Hughes and signed on the same day as the Skyline Subcontract, obligating Skyline to pay to ARCO Business Services, Ltd., a business trust administered by Hughes, finder's fees and engineering consulting fees (Skyline/ARCO Fee Agreement). Under this agreement, Skyline would pay ARCO Business Services approximately twenty-nine percent of each progress payment paid by the government to Skyline during the course of the work, plus any remaining amounts paid by the government to Skyline in excess of $1.2 million.

On August 14, 1989, Rhoades and Schluneger signed the Takeover Agreement. They did not disclose to the Corps either the arrangement for finder's fees and consulting fees or Skyline's initial bid to complete the work for $1.2 million.

Before Skyline commenced work on the project, Hughes prepared another agreement (ARCO/Rhoades Fee Agreement), on August 18, 1989, obligating ARCO Properties, Ltd. (another Hughes business trust) to pay kickbacks to Rhoades equal to fifty percent of all money received by ARCO Business Services under the Skyline/ARCO Fee Agreement.

The payment scheme, which took place over the next three years, was carried out in the following manner: Nancy

Norvell, president of Skyline, prepared all requests for progress payments, which included the bogus finder's fees and engineering fees. She included these fees in her progress reports based on the misrepresentations by Rhoades and Schluneger that they were incurring costs and expenses to ARCO Business Services in their performance of the government contract. Norvell submitted these progress payment requests to Rhoades who reviewed and approved them. Rhoades then sent the requests for payment to the Corps.

Payments were mailed to Rhoades and made jointly payable to Rhoades and Schluneger. After obtaining Schluneger's endorsement, Rhoades usually made disbursements to Skyline. Skyline then made disbursements to ARCO Business Services, which in turn made disbursements to ARCO Properties. Both ARCO companies made kickback payments to Rhoades, Schluneger and Rhoades's spouse. Schluneger received about $38,000 throughout the course of the scheme. The scheme was uncovered when Skyline abandoned the project due to financial problems, and Rhoades and Schluneger defaulted on the contract.

The government indicted Schluneger, Rhoades, Hughes, ARCO Business Services and ARCO Properties each on one count of conspiracy to defraud the government. The jury returned guilty verdicts against all defendants.[1]

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[1] Rhoades died on June 21, 1998. On August 3, 1998, the government moved to dismiss the indictment against Rhoades. By special verdict, the jury found that ARCO Business Services

Schluneger and the other defendants moved for judgments of acquittal and a new trial. The district court denied all motions. Schluneger was subsequently sentenced to twelve months' imprisonment and three years' supervised release, and was ordered to pay $10,000 in restitution.

## II.

Schluneger argues that the district court erred in denying his motion for a judgment of acquittal or alternatively for a new trial. We review the district court's decision to deny a motion for a new trial for an abuse of discretion. See United States v. Byrne, 171 F.3d 1231, 1235 (10th Cir. 1999). We review de novo the district court's decision to deny a motion for judgment of acquittal. See United States v. Janusz, 135 F.3d 1319, 1323 (10th Cir. 1998). When applying de novo review, this Court views the evidence in the light most favorable to the government and asks whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. (quotation marks omitted) (emphasis in original).

### A.

Schluneger first argues there was insufficient evidence to convict him of conspiracy to defraud the government. We disagree.

It does appear from the record that Schluneger was not involved in creating the two Fee Agreements (the

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withdrew from the conspiracy in June 1992.

Skyline/ARCO Fee Agreement and the ARCO/Rhoades Fee Agreement). Nevertheless, there is more than sufficient other evidence demonstrating Schluneger's participation in the conspiracy to overcharge the government. Schluneger signed the Takeover Agreement, limiting himself and Rhoades to actual costs and expenses. He also signed the Skyline Subcontract, which stated that the amount necessary to complete the work would be $1,690,000, even though the Skyline bid was for $1,200,000. Finally, he received $38,000 from Rhoades for work he did not do, even though he knew he was to be paid only for actual costs and expenses. Schluneger knew that the amount remaining on Minelli's contract was $1,690,000. If Skyline were to be paid the full $1,690,000, then there would have been no money for distribution to him and Rhoades.[2] Thus, even if Schluneger did not personally participate in creating the Fee Agreements, a reasonable jury could find that he was aware of the agreements and that he participated in the scheme to defraud.

Schluneger also argues that, because he and Rhoades were subrogated to Minelli as sureties, they were entitled to recover the full price of the original contract with the government. Thus, he contends, as a matter of law there was no fraud. This argument is without merit. Schluneger ignores the fundamental nature of the conspiracy -- that he and the other defendants submitted an inflated bid to be paid for services that they were not performing. Rhoades and

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[2] In addition, Schluneger participated in a later agreement (unrelated to the case at hand) which amended portions of the Skyline Subcontract. This agreement referred to the Skyline/ARCO Fee Agreement "for the furnishing to Skyline of engineering and consulting services." Appellant's App. at 766.

Schluneger chose to enter into the Takeover Agreement and complete the work with a subcontractor and bound themselves to recover only their actual costs and expenses, which were $1.2 million under the initial Skyline bid. They were not entitled to anything more.

Thus, viewing the evidence in the light most favorable to the government, there was sufficient evidence for the jury to convict Schluneger. The district court properly denied the motions for judgment of acquittal and the motion for a new trial.

**B.**

Schluneger next claims that the district court erred in refusing to admit certain evidence during his cross-examination of one of the government's witnesses. The evidence related to previous bids made on the contract (at the time of Minelli's bid) and the government's estimates at that time of what the project would cost to complete. At trial, Schluneger attempted to argue that he and Rhoades relied on these earlier bids in submitting the Skyline Subcontract for $1.69 million and that this reliance demonstrated good faith and lack of criminal intent. However, it is irrelevant whether they in fact relied on any earlier bids, as this evidence does not negate the fact that he and Rhoades agreed in the Takeover Agreement not to recover anything above their actual costs and expenses. Thus, the district court did not abuse its discretion in refusing to admit this evidence. See United States v. Lugo, 170 F.3d 996, 1005 (10th Cir. 1999) (standard of review).

## III.

At sentencing, the district court applied the appropriate fraud guideline, U.S.S.G. § 2F1.1. The court assigned a base offense level of six and added nine levels because the amount of the loss was $490,000 (the difference between the Skyline bid and the amount remaining on the Minelli contract). See U.S.S.G. § 2F1.1(a)-(b). The court then added two levels for more than minimal planning under § 2F1.1(b)(2). Finally, the court gave Schluneger a four point downward departure under § 3B1.2(a) for being a minimal participant. The final offense level was thirteen.

Schluneger challenges his sentence on two grounds. First, he argues he should not be held responsible for the entire amount of the loss. Second, he argues he should not have received a two level increase for more than minimal planning because he received a reduction for being a minimal participant. We review the district court's application of the sentencing guidelines de novo and its factual findings for clear error. See United States v. Pretty, 98 F.3d 1213, 1222 (10th Cir. 1996).

### A.

In a conspiracy case, loss is calculated "on the basis of all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." United States v. Brown, 164 F.3d 518, 522 (10th Cir. 1998)

(quotation marks omitted); see also Pretty, 98 F.3d at 1222; U.S.S.G. § 1B1.3(a)(1)(A).

Schluneger argues that, in calculating the loss, the district court should have considered his relative role in the conspiracy. See United States v. Melton, 131 F.3d 1400, 1404 (10th Cir. 1997) ("the court must keep in mind that 'the scope of the criminal activity jointly undertaken by the defendant . . . is not necessarily the same as the scope of the entire conspiracy'" (alteration in original) (quoting U.S.S.G. § 1B1.3, comment. (n.2))). Because he was not a party to the creation of the Fee Agreements, he argues, he was unaware that the intended loss was $490,000.

Schluneger's argument is unavailing. This is not a case where a defendant's coconspirators engaged in acts to which the defendant did not agree or about which the defendant did not know. See Melton, 131 F.3d at 1404-06 (holding $30 million loss not attributable to defendant where defendant never agreed to criminal activity undertaken after his arrest). Here, Schluneger agreed with his coconspirators to defraud the government on the Skyline subcontract. He knew of both the original Skyline bid and the submitted inflated bid. He was also receiving money for work he did not do and which the Takeover Agreement did not permit. The fact that he did not know exactly how the $490,000 was to be distributed is irrelevant. The district court thus correctly applied the guidelines in calculating the amount of loss.[3]

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[3] At sentencing, Schluneger also objected on the ground that the actual loss was only approximately $200,000 and that this

**B.**

Under U.S.S.G. § 2F1.1, the court may increase the offense level by two levels if the offense involved more than minimal planning. More than minimal planning exists where "there are repeated acts over a period of time, unless it is clear that each instance is purely opportune." United States v. Copus, 110 F.3d 1529, 1537 (10th Cir. 1997); see U.S.S.G. § 1B1.1 comment. (n.1(f)).

The district court properly awarded the increase in this case because the offense involved a series of repeated acts over period of three years -- forming the various agreements, submitting the progress reports, and cashing the checks -- which were not purely opportune. See United States v. Wise, 990 F.2d 1545, 1550-51 (10th Cir. 1992) (more than minimal planning increase appropriate where defendant executed five notes and submitted twelve false draw letters in order to obtain money). Schluneger argues that the increase for more than minimal planning is inconsistent with the downward departure he received for being a "minimal participant. See U.S.S.G. § 3B1.2 (mitigating role adjustment). We disagree.

Schluneger's argument overlooks the fact that the two provisions measure different aspects of the concerted criminal activity: the minimal participant inquiry is a measure of the participant's role in the concerted criminal activity, whereas

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should be the amount calculated for sentencing purposes. The district court properly rejected this argument, as the amount of loss is the greater of the actual or intended loss. See United States v. Banta, 127 F.3d 982, 983 (10th Cir. 1997).

the more than minimal planning inquiry is a measure of the extent or nature of the criminal activity itself. Cf. United States v. Massey, 48 F.3d 1560, 1570 (10th Cir. 1995) (holding that increases for more than minimal planning and aggravating role adjustments under U.S.S.G. § 3B1.1 were not double counting because they "address different concerns. The adjustment for more than minimal planning was intended to distinguish between relatively simple crimes and more sophisticated ones. On the other hand, the adjustment for role in the offense[] addresses concerns about the relative responsibilities of those involved in the commission of the offense. . ." (citations and quotation marks omitted)). Thus, the district court did not abuse its discretion in imposing this increase.

## IV.

For the foregoing reasons, we AFFIRM the decision of the district court.

## APPENDIX B

## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

[Filed August 26, 1998 ]

No. 97-CR-98-C

UNITED STATES OF AMERICA, *Plaintiff,*

v.

THOMAS S. RHOADES, STEPHEN L. SCHLUNEGER, T. ROBERT HUGHES, ARCO BUSINESS SERVICES, LTD., and ARCO PROPERTIES, LTD., *Defendants.*

ORDER

Before the Court are post-trial motions filed by defendants Thomas Rhoades, Stephen Schluneger, Robert Hughes and ARCO Properties, Ltd. for acquittal or alternatively for new trial. Due to the recent death of defendant Thomas Rhoades, the government moved to dismiss the indictment as to Rhoades. Government's motion was granted by the Court on August 6, 1998. Accordingly the

post-trial motions filed by Rhoades have been rendered moot by the dismissal of the indictment.

In considering post-trial motions filed by a defendant who has been found guilty in a trial by jury, the evidence must be considered by the Court in a light most favorable to the government to determine if the jury could have found the defendant guilty of the essential elements of the crime beyond a reasonable doubt. *See, e.g. U.S. v. Allsworth, Jr.*, 138 F.3d 843 (10th Cir. 1998).

The evidence at trial established the following: On February 8, 1988, the Corps of Engineers awarded a contract in the amount of $1,828,106 to Frank Minelli, doing business as Swiss Craft Professional Painters, to sandblast and repaint the Robert S. Kerr and the W.D. Mayo locks and dams on the Arkansas River. As a condition to entering into a contract with the government, it was necessary for Minelli to provide the Corps of Engineers with a performance bond. The performance bond was furnished by defendants Thomas Rhoades and Stephen Schluneger, as sureties under the government contract, in the event of Minelli's default. The penal amount under the bond was $731,242.40, with a performance limitation in the amount of the contract price of 1,828.106. In the indictment, the Minelli contract was referred to as the Government Contract. Minelli defaulted by failing to comply with the schedule and specifications of the Government Contract. The Corps of Engineers terminated Minelli as contractor on July 18, 1989; and on that same date, the Corps of Engineers demanded defendants Rhoades and Schluneger, to satisfy their obligation as sureties. Under the performance bond and federal regulations, Rhoades and Schluneger were given the options to immediately complete

the work with a contractor of their choice that was acceptable to the government, or to complete the work with their own forces, or to make payment to the government for the liability under the bond. If Rhoades and Schluneger chose to satisfy the penal amount under the bond of $731,242.40, it would have required a cash layout by them. By electing to complete the performance, they were not obligated to any cash layout.

On August 14, 1989, Rhoades and Schluneger advised the government that they elected to take over the work and finish it by hiring a subcontractor. To perform under the bond, the Corps of Engineers required Rhoades and Schluneger to execute a Takeover Agreement. The Takeover Agreement restricted Rhoades and Schluneger from receiving any compensation for the work performed except for "actual costs and expenses incurred in completion of the work." In no event would Rhoades and Schluneger be compensated for "any amount in excess of total expenditures necessarily made in completing the work and discharging" their liability under the performance bond.

Rhoades and Schluneger solicited a bid from Skyline Painting and accepted Skyline's bid in the amount of $1,200,000 to complete the work required under the Government Contract. Without government's knowledge, Rhoades and Schluneger required Skyline to sign a letter agreement, prepared by defendant Hughes, which misrepresented that Skyline would complete the Government Contract for $1,690,000, instead of the agreed contract bid of $1,200,000. The differential, through various formulas, was to be paid to Rhoades, Schluneger, and Hughes as so-called "finders fees and engineering consulting fees." Rhoades, Schluneger and Hughes did not disclose to Skyline that these

purported "fees" were not authorized under their Takeover Agreement with the Corps of Engineers nor did they disclose that no such engineering consulting services were being rendered by them or the two ARCO Trusts.

Skyline prepared the progress reports for the Corps of Engineers. As required under its agreement with Rhoades and Schluneger, the payments were inflated to include the finders fees and engineering consulting fees. The progress reports were reviewed and approved by Rhoades and sent to the Corps of Engineers.

The progress payments were made by U.S. Treasury checks jointly payable to Rhoades and Schluneger and mailed to Rhoades. Rhoades obtained the endorsement of Schluneger, made disbursements to Skyline and then Skyline made disbursements to Hughes. Hughes channeled the funds through the ARCO Trusts which paid the unauthorized kickbacks to Rhoades, Schluneger and Rhoades' spouse.

Unknown to the government, Rhoades, Schluneger and Hughes were receiving payments for so-called finders fees and engineering consulting services but they were performing no such services, either directly or indirectly. Receipt of these funds by Rhoades, Schluneger and Hughes were fraudulent because they were received by them without the expenditure of any "costs or expenses".

Defendant Stephen Schluneger moves for acquittal or new trial on the grounds of insufficient evidence to support conviction. Schluneger argues that there is no evidence of intentional wrongdoing by the defendants for the following reasons 1) Ms. Norvell filled out the required progress chart

and transmitted payments which were approved by the Corps of Engineers, 2) the defendants did not discuss with Ms. Norvell the preparation of the progress chart, the substantive preparation of the claims, or the validity of the numbers on the claims, and 3) all parties understood that the claims for payment were to be submitted to the Corps of Engineers according to the original contract price, not the Takeover Agreement. Accordingly, Schluneger argues that the evidence does not establish any fraud or intent to defraud because the claims for payment were presented and paid in accordance with the Government Contract and its modification.

Schluneger's arguments are clearly without merit because Rhoades, Schluneger, Hughes, ARCO Business and ARCO Properties were receiving unauthorized kickbacks from the Corps of Engineers without performing any services and without incurring any "costs and expenses." It is irrelevant who prepared the progress payments which were submitted. Under the terms of the Takeover Agreement, the defendants were only authorized to receive payments for "actual costs and expenses." The cost of performance was Skyline's bid of $1,200,000, not the original contract amount of $1,828,106. The contract amount of $1,690,000 which Rhoades and Schluneger required of Skyline was false because Skyline was only receiving $1,200,000 as compensation for actual work performed. The progress reports failed to disclose to the Corps of Engineers that requests were inflated to include false claims for services not performed. The defendants accepted the kickbacks knowing they did not perform any work and that such payments were in violation of both the Government Contract and the Takeover Agreement. Accordingly there is no merit to Schluneger's

argument that Skyline filled out the required progress chart requesting progress payments or that Skyline verified the validity of those requests to the Corps of Engineers. It was the unauthorized receipt or a portion of those payments by the defendants, without incurring any costs and expenses which was the scheme to defraud the government.

Contrary to Schluneger's arguments, the above-stated evidence established fraud or intent to defraud by the defendants, as co-conspirators, beyond a reasonable doubt. The jury's verdict of guilty is supported by sufficient evidence. This evidence and the inferences which can be drawn therefrom are sufficient to show that the defendants willfully entered into an agreement to defraud the government and thereafter committed acts in furtherance of that unlawful agreement.

Schluneger also argues that he was denied the right to present his theory of defense to the jury, which included claims that the Takeover Agreement was not supported by new consideration, it was ambiguous, and that the parties did not intend for the Takeover Agreement to be controlling. Both the Takeover Agreement and the Government Contract were admitted into evidence. Defendants were provided the opportunity to point out to the jury any provisions which they believed were relevant to their defense.

The Takeover Agreement provided that due to default by the original contractor, the sureties were to complete the work. The evidence at trial established that, in violation of the their agreement with the Corps of Engineers, the defendants fraudulently entered into side agreements to receive illegal kickbacks.. These side agreements allowed the

defendants to skim funds from the government under the guise of finder's fees and engineering consulting fees without the defendants performing any such services. Government's evidence was that, unknown to the government, the defendants were submitting progress payments in inflated amounts for work which had not been performed. Defendants' proffered theory of defense was that they were permitted to submit such additional fees based on an alleged course of conduct. Course of conduct is not relevant under the facts of this case because the services were not performed and the requests for fees for such services was a fabrication. Rhoades and Schluneger were only authorized to submit claims for their actual costs and expenses. The evidence established that the only cost and expense to Rhoades and Schluneger was the $1,200,000 subcontract obligation with Skyline. Their receipt of any additional payments from the Corps of Engineers was fraudulent. Further, Schluneger proffered no evidence that these defendants had any prior dealings with the government to support a defense of course of conduct. The issue to be determined by the jury was whether the side agreements involved fees for services actually rendered by Rhoades and Schluneger and approved by the Corps of Engineers, or whether Rhoades and Schluneger performed no such services rendering the fee payments fraudulent and unknown to the government. In finding the defendants guilty, the jury determined the latter. There is sufficient evidence to sustain the jury's finding.

Schluneger claims that the Court failed to allow into evidence unspecified exhibits or testimony in order for him to establish his theory of defense. The Court properly excluded Schluneger's proffered evidence because the evidence was irrelevant and immaterial to the charges contained within the

indictment, i.e. whether Rhoades and Schluneger incurred any authorized costs and expenses to justify their receipt of payments.

* * * *

Note: The intervening text of this order has been redacted because it deals solely with the independent and unrelated issues raised by defendants Robert Hughes and ARCO Properties.

* * * *

Having considered the arguments raised by defendants Schluneger, Hughes, and ARCO Properties for acquittal and for new trial, the Court finds and concludes said arguments are without merit and are accordingly denied.

IT IS SO ORDERED this 26th day of August, 1998.

/s/_____
H. DALE COOK
Senior U.S. District Judge

## APPENDIX C

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF OKLAHOMA**

[Filed October 20, 1998]
[Entered October 21, 1998]

No. 97-CR-098-002-C

UNITED STATES OF AMERICA )
*Plaintiff,* )
)
v. )
STEVEN L. SCHLUNEGER )
*Defendant.* )

**JUDGMENT IN A CRIMINAL CASE**
**(For Offenses Committed On or After November 1, 1987)**

The defendant, STEVEN L. SCHLUNEGER, was represented by Robert G. Green.

The defendant was found guilty on February 26, 1998 on Count 1 of the Indictment after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count, involving the following offense:

*District Court Judgment & Sentence* 10/20/98

| Title & Section | Nature of Offense | Date Offense Concluded | Count Number(s) |
|---|---|---|---|
| 18 USC 371 | Conspiracy to Defraud the United States | 3/22/96 | 1 |

As pronounced on October 13, 1998, the defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $ 50, for Count 1 of the Indictment, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 20th day of October, 1998.

/s/_____
The Honorable H. Dale Cook
United States District Judge

Defendant's SSN: 448-36-9405
Defendant's Date of Birth: 8/25131
Defendant's residence and mailing address:
6717 E. 1st Avenue, Scottsdale, Arizona

United States District Court )
ss:
Northern District of Oklahoma )

I hereby certify that the
foregoing is a true copy of the
original on file with this court.

Phil Lombardi, Clark

By /s/_____
Deputy

Defendant: STEVEN L. SCHLUNEGER
Case Number: 97-CR-098-002-C

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 12 months.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons before 9:00 a.m, on January 4, 1999.

**RETURN**

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____

to _____ at _____,

with a certified copy of this Judgment.

_____

United States Marshal

By _____

Deputy Marshal

Defendant: STEVEN L. SCHLUNEGER
Case Number: 97-CR-098-002-C

**SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of thirty-six months.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. The defendant shall report in person to the Probation Office in the district to which the defendant is released as soon as possible, but in no event, later than 72 hours of release from the custody of the Bureau of Prisons.
2. If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.
3. The defendant shall not own or possess a firearm, destructive device, or other dangerous weapon.
4. The defendant shall abide by the "Special Financial Conditions" enumerated in Miscellaneous Order Number M-128, filed with the Clerk of the Court on March 18, 1992.

## STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state, or local crime. In addition:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
4) The defendant shall support his or her dependents and meet other family responsibilities.
5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.
8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

14) The defendant shall submit to urinalysis testing as directed by the U. S. Probation Office.

Defendant: STEVEN L. SCHLUNEGER
Case Number: 97-CR-O98-002-C

## RESTITUTION AND FORFEITURE

### RESTITUTION

The defendant shall make restitution in the total amount of $10,000. Interest on restitution is waived by the Court.

The defendant shall make restitution to the following persons in the following amounts:

| Name of Payee | Amount of Restitution |
|---|---|
| USAED Tulsa, FAO<br>USACE Finance Center<br>Attn: Disbursing<br>7800 3rd Avenue<br>Milington, Tennessee 38054-5005 | $10,000 |

Payments of restitution are to be made to the Clerk of the Court for the Northern District of Oklahoma for transfer to the payee.

Restitution shall be paid in full immediately. Any amount not paid immediately shall be paid while in custody through the Bureau of Prisons' Inmate Financial Responsibility Program. Upon release from custody, any unpaid balance shall be paid as a condition of supervised release.

If a victim has received compensation from insurance or any other source with respect to a loss, any restitution ordered shall be paid to the person who is a victim before any restitution is paid to any such provider of compensation.

Any payment shall be divided proportionately among the payees named unless otherwise specified here.

Defendant: STEVEN L. SCHLUNEGER
Case Number: 97-CR-098-002-C

## STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

**Guideline Range Determined by the Court:**

| | |
|---|---|
| Total Offense Level: | 13 |
| Criminal History Category: | I |
| Imprisonment Range: | 12 months to 1-8 months |
| Supervised Release Range: | 2 to 3 years |
| Fine Range: | $ 3,000 to $ 30,000 |
| Restitution: | $ 236,158 |

The fine is waived or is below the guideline range because of the defendant's inability to pay.

Full restitution is not ordered for the following reason: because of the defendant's inability to pay.

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

## APPENDIX D

## UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[Filed August 19, 1999 ]

No. 98-5200

UNITED STATES OF AMERICA,
*Plaintiff- Appellee,*

v.

STEVEN L. SCHLUNEGER,
Originally indicted as Stephen L. Schluneger then amended to reflect true name of Steven L. Schluneger,
*Defendant - Appellant,*

### ORDER

Before **TACHA, MAGILL,*** and **BRISCOE**, Circuit Judges.

* Honorable Frank Magill, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

Appellant's petition for rehearing is denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/_____
Deputy Clerk

## APPENDIX E

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF OKLAHOMA**

[Taken 2/24/98 ]

No. 97-CR-98-C

| | |
|---|---|
| UNITED STATES OF AMERICA, *Plaintiff,* | ) |
| v. | ) |
| THOMAS S. RHOADES, STEPHEN L. SCHLUNEGER, T. ROBERT HUGHES, ARCO BUSINESS SERVICES, LTD., and ARCO PROPERTIES, LTD., *Defendants.* | ) |

REPORTER'S TRANSCRIPT OF JURY TRIAL

HAD ON FEBRUARY 24, 1998

Volume II

BEFORE THE HONORABLE H. DALE COOK,
Senior Judge.

APPEARANCES:

For the Plaintiff: MR. GORDON CECIL
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103

For the Defendants: MR. PAUL BRUNTON
Attorney at. Law
610 South Main
Tulsa, Oklahoma 74103

TERRI COPELAND
UNITED STATES COURT REPORTER

* * *

[page 193]

. . . them at the same time, and did they have it, or access to it when they executed the contract?

A. I don't know. It should have been sent to them with the Takeover Agreement, since it's indicated as an exhibit.

Q. Isn't it true that the contract came to you -- the Takeover Agreement, I should say, came to you executed already by Mr. Rhoades and Mr. Schluneger, and you subscribed your signature to it, and that's the date of August 14th that appears on here?

A. Yes.

Q. So you don't know -- you believe it should have been, but you don't know they actually had a copy of the contract -

THE COURT: Mr. Hughes, I'm having great difficulty understanding what the relevance of this line of questioning is.

HR. HUGHES: The point, Your Honor, is that if Mr. Rhoades and Mr. Schluneger did not have access to the contract, the government has asked them to and, in fact, I think as Mr. Hedrick has pointed out, not seriously negotiated with them, but required them to execute an agreement -

THE COURT: Mr. Hughes, just one moment. The gentlemen requested a Takeover Agreement. The government agreed to the Takeover Agreement. They signed the Takeover Agreement. Nobody has contested the validity of the Takeover Agreement because it is uncontestable.

Now, let's go on to the matters that are at hand. There is no question but they undertook the completion of the project, based upon the Takeover Agreement. Now, if you've got any relevant questions of this witness, that's fine. If you haven't, then let's not get into prior negotiations that no longer have relevance here.

MR. HUGHES: Your Honor, I submit -- I appreciate that, Your Honor, and I submit that the prior negotiations may be relevant if the defendants did not understand the contract they were signing.

THE COURT: I'm sorry, but that is not a defense. You don't have the right to defraud the government, no matter

what, if that occurred. You have the right to submit, there's no question, but that there was a submittal of these monies and the government paid out under the agreement. Now, are you trying to say that they just owe the flat money back to the government?

MR. HUGHES: No, Your Honor. I –

THE COURT: Well, they followed the contract. The contracts are in being. This is not a civil case in which you're trying to rescind contracts. Now, let's go forward with matters that are relevant to the issues in this case.

MR. HUGHES: All right.

Q. (By Mr. Hughes) Mr. Hedrick, did you review any correspondence or have any notice of Mr. Rhoades or. . .

* * *